

Net-Worth

Written by Dan Shefet, March 2018

Thoughts on philosophy, Tech and Law.

Don't worry, I shall not mention Bentham, Orwell, Kafka, Foucault or Lessig. Enough reference has been made to their contributions to the debate (which has now been replaced by a « conversation »).

Let's start with "Me-Too".

The Cultural Denunciation Syndrome

In my opinion this initiative or movement is different from what I call the « Cultural Denunciation Syndrome » ("CDS") i.e. the power unleashed by the Net to hurt anyone you dislike by public denunciation of some imagined "offence", crime or transgression. Me-Too is different because it incorporates an important dimension of emancipation and transparency – it is not per se inimical to other values.

It does however put other values at jeopardy and in particular due process /the right to representation and the presumption of innocence (the most important human right, if I had to pick just one), but it is not as such evocative of the CDS.

This syndrome has plagued civilization during various periods of history – the darkest in humankind's journey.

When denunciation becomes the accepted social norm. When it becomes politically correct and is no longer conduct frowned upon and exercised in secret and in shame we have accomplished yet another step in our regression towards « alienation of the other » (as Sartre would have put it).

Denunciation as a form of social behaviour has been the subject of moral and political philosophy throughout the ages.

Probably the best known are the theories of J.S. Mill (The Utilitarian Imperative) and Kant (The Categorical Imperative).

In our modern age of so-called "liberalism" Mill's philosophy clearly drives consensus more than Kant's, Spinoza's and Buber's - to our greatest misfortune: As soon as people invoke « the greater good » there is reason to be alarmed and the danger to individual integrity grows one further step when reference is made to principles or religion. When such acts against « the other » are justified by these mantras you can be certain that a dehumanizing agenda is at play.

In recent history publicly accepted and even encouraged denunciation reached its pinnacle during the years of WW2, but it has since been met with consensual/cultural disapproval.

For many years it was labelled unacceptable social conduct.

The horrors of the NSDAP's denunciation culture and the atrocities it produced have however unfortunately drifted into oblivion and the Net has contributed to its revival.

Like a Phoenix the ugly hydra of denunciation is born again and flourishes as never before fueled, encouraged and nurtured by the Net. One may indeed speak of a new Culture of Denunciation or CDS.

There are many reasons for this. The most significant seem to be the following: It has never been easier, cheaper, more harmful and riskless to denounce someone.

The Net is anonymous, pervasive, ubiquitous and delivers immediate gratification to the denunciator while at the same time the wolfpack of public tribunal has an insatiable appetite for denunciation.

A win – win for everyone except the victim.

It is often said that the Net fosters disinhibition. In reality the dynamics are much worse: The Net leads to alienation (as Marx would have said it had he been around today).

Concurrently, reputation has never meant as much as it does today.

You are your reputation. You are what other people say you are (courtesy Sartre) and to top it all off we have never been so wary of protecting ourselves against criticism (covering ourselves) both professionally and in our private affairs.

Our life has turned into a constant gauntlet run. A perpetual angst of offending anyone and behaving in any way outside the accepted formula. An Escape from Freedom. A fear of being noticed apart from artificial spates of intermittent fame.

This age will be known as that of « Cultural Denunciation ».

But denunciation only works if the wolf pack believes it.

It is the combination of Net facilitating, alienation and belief that allows CDS to prosper.

Gullible Robots and Truth

This is where the second unfortunate development kicks in. Instead of becoming smarter our information glut has turned us into gullible robots. We believe everything we read – even Wikipedia...

The test of truth is public opinion and correlation (statistics- not epistemology and certainly not cosmology).

This is exactly what Kierkegaard meant when he wrote: *“Truth always rests with the minority, and the minority is always stronger than the majority, because the minority is generally formed by those who really have an opinion, while the strength of a majority is illusory, formed by the gangs who have no opinion — and who, therefore, in the next instant (when it is evident that the minority is the stronger) assume its opinion... while truth again reverts to a new minority.”* (No this is not, and has nothing to do with Nietzsche).

Unfortunately, the self-regulatory mechanism in Kierkegaard’s criterion of truth no longer works.

However, leaving the determination of truth to public opinion and free speech has no basis in reason.

Kierkegaard's version of Oliver Wendell Holmes' famous metaphor of the man shouting fire in a theater expresses (100 years before) a much deeper analysis and wisdom:

"A fire broke out backstage in a theatre. The clown came out to warn the public; they thought it was a joke and applauded. He repeated it; the acclaim was even greater. I think that's just how the world will come to an end: to general applause from wits who believe it's a joke."

Truth is neither a function of the perceived speaker nor the audience.

At this point it is important to recall the philosopher's unique analysis of the relationship between speech and understanding:

"People demand freedom of speech as a compensation for the freedom of thought which they seldom use".

Have we given up our quest for the kind of knowledge and science that truly liberates us and allows us to shape our own ideas and opinions and if so is the reason that we no longer have the courage to fight for them?

It may very well be argued that the greatest lie of all is that free speech is conducive to knowledge.

Present day epistemology has not only been reduced to correlations, but our window to the world around us now passes through an additional screen (not only in the physical, but also in the metaphysical sense). Our cognition of nature is biased by what may be described as "double phenomenology" (that's probably what Husserl and Hegel would have called it). We have never been further removed from "das Ding an sich".

I don't know what is the greatest danger to knowledge: Too much information (which equates no information to paraphrase Flaubert) or information controlled by black boxes, but I do know that the combination of the 2 leads to the collapse of enlightenment.

The latest invention which is peddled as a life saver by the Titans is "Artificial Intelligence", but it seems to me that we are witnessing is an adaptation of the human brain to machine logic rather than the opposite.

We have been conditioned to "bit-thinking" so consistently and pervasively that we almost intuitively measure the value of our thoughts in terms of their algorithmic adaptability.

Information control

There is yet another variable in the equation which leads to the demise of critical thought, individualism and the rise of alienation, intolerance and hatred and that is the undemocratic nature of the Net:

Never has so much information been controlled by so few (thank you Churchill).

This unique control of information had it been in the hands of government would have qualified as totalitarianism (as analysed by Hannah Arendt and Raymond Aron).

For some reason we seem not to be uncomfortable with the idea that our lives (because as we have seen we are what other people say. We are not what we come from or what we make of ourselves. We are our Net reputation) are controlled by less than a handful of private corporations.

We seem to trust that these corporations are not evil...

Is there any rational reason to do so?

Haven't we learned from history that power corrupts? Have we forgotten Machiavelli?

Have we forgotten that corporations owe allegiance to their shareholders and not to the community or values?

Are financial fraud, corrupt practices and manipulation just fictions of our imagination? They never happened?

Power corrupts and "*absolute power corrupts absolutely*".

"*Word power is world power and the pen is mightier than the sword*" we are told, but we fail to grasp the wisdom and the consequences of those words. Otherwise we would have never accepted to surrender our freedom to a handful of corporate giants.

Recently Thaler and Sunstein have eloquently demonstrated how easy it is to "nudge" us into making decisions that are not necessarily in our best interest. I'm afraid that the power wielded by the Titans holds potential for exceedingly gentle nudges (sorry promised not to refer to Foucault).

The True Function of Speech

Why did we give up so easily and without a fight?

There are multiple reasons, the primary being untamed celebration of technology for its own sake ("l'art pour l'art"), but that is just the tip of the iceberg.

If we are to understand the true dynamics of our present self-inflicted serfdom we need to dig deep into psychology, sociology and philosophy.

The social function of language was already identified and explained by Aristotle and further developed by philosophers like Bergson, Chomsky and Austin.

We now start to understand that the true function of speech is a means of social coherence. We communicate because we are and to a large extent we are because we communicate.

Speech is not simply a vector of arguments and opinions engaged in some metaphysical market place of ideas pitted against each other and subject to arbitration by a *deus ex machina* or Darwinistic selection process which ensures the survival of the fittest (a terrible notion given the impressive number of aborted and misfit mutations on the way...).

The revered Marketplace of Ideas is based on the assumption that syllogistic logic applies to ideas, but we have known since the scholastics that material logic often clouds Venn Diagrams (for instance “argumentatum ad hominem”, “misericordiam” or “verecundiam”).

Entertaining and cultivating the notion that speech is an agent employed in a marketplace the function of which is to ensure humankind’s serendipity is a gift to the Titans, but the theory is seriously flawed.

Unfortunately, the myth appears to find a strong ally in recent Supreme Court judgements (it is well worth to be reminded that free speech absolutism was not always the philosophy of the Supreme Court, see below).

The Titans also understood that free speech as a notion carries extremely positive connotations and they cleverly anointed themselves as knights of The Order of Free Speech.

Who would argue against the Holy Grail?

The Titans were no longer just corporations driven by sheer cupidity. They became champions of a cause and obtained both popular and governmental backing.

In reality I would venture that they couldn’t care less about Free Speech, but it’s a great platform.

Soon they would refer to the Arab Spring as a revolution brought about by their almost altruistic contribution to mankind conveniently forgetting the events that followed the « Spring » and likewise conveniently disregarding how these same services contributed to hatred and violence at the time and continue to do so all over the planet.

Their power has now become so pervasive that few are those that have the moral courage to challenge them and as the ace up their sleeve they do not hesitate to instrumentalize fairly recent Supreme Court ideology.

At this point it may be useful to recall that current Supreme Court practice was actually only promulgated in 1969 in *Brandenburg v Ohio*.

Prior to that decision the pendulum swung several times between broadly permitted restrictions to speech and protection.

The Tech Titans have succeeded in expounding a Free Speech dogma which purports to be timeless and which is based on a Hobbesian view of the individual’s «natural state » without regard to the social Aristotelean function of speech.

Very clever: They have concocted an ingenious variant of life style marketing combined with almost militant product allegiance fueled by evangelistic Free Speech fetishism and a sense of fraternal « geekhood ». « We » are not just users/consumers- we are part of a monumental movement which brings happiness (salvation ...) to the world and to those who haven’t yet seen the light (does this remind you of the crusades and the crimes that took place in the name of Christianity during the age of colonialism and mercantilism?).

They have cleverly turned each and every one of us into their squires and sales reps.

When Francois Hollande orchestrated his stunt after the horrendous terrorist attack on Charlie Hebdo and invited 57 heads of state to march through the streets of Paris (some 3,7 M people reportedly emulated this initiative all over France) he did so in the name of Free Speech. He would not have achieved these impressive numbers if he had called for a march against terrorism and he knew that.

Free Speech is an almost overpowering asset (Yes, unfortunately it has been appropriated by so many different commercial and political agendas that it is no longer a true value. If Free

Speech was a copyrightable product the line of right holders would be infinite). If you can rally Free Speech on your side, you are sure to win.

I did not join the march. I felt something was wrong and understood what it was later when reading Emanuel Todd's brilliant book on the event which appeared some 6 months later: The march/demonstration was not really intended to protect Free Speech. In reality it was an apology for the right to debase other peoples' values and religion. It was a vindication of intolerance and disrespect and the alibi was Free Speech.

I honestly think that no human right has been so consistently abused, folded, spindled and manipulated to serve different agendas as Free Speech.

It is now being cleverly hijacked by the Titans who may sit back and let the rest of us grow their power and control over all of us in its name.

We are producing our own serfdom with enthusiasm.

We are faced with a behemoth that we passionately helped create - just like the Golem of the Old Testament (or Shelley's famous allegorical monster created by the nexus of cutting edge tech at the time and a simple mistake – they picked the wrong brain ...).

If it had been properly understood that "Free Speech" serves the purpose of facilitating human intercourse it would also be understood that speech which does not promote such social interaction does not fulfil its purpose or "finality".

This recognition would invariably lead to regulation and accountability (both penal and civil) and thereby increase the operational costs of the Titans considerably - just like money laundering compliance has increased the cost of banking and environmental protection has added to the cost of industry and transport.

The natural state of man is not Hobbesian or Lockean (hostility or « tabula rasa »), but Aristotelian: Man is a social animal.

The purpose of speech is social. It is not communication of facts, opinions or domination.

« Small talk » is the purpose of speech.

We are highly gregarious creatures and speech helps us establish and maintain the rapport with « the other » which is indispensable to our social and psychological wellbeing and quintessential to our existence and fulfillment of the human condition. Ideas are not binary. We may all be right even if that would appear illogical in a reductionist world.

If speech exclusively or primarily serves the purpose of domination and domination is the social goal it is indeed impossible to curtail it in any way since that would amount to deprivation of our right to dominate.

The Code is the Code

Now in order to understand the dynamics that lead us to where we are today we will also have to analyze the real meaning of the celebrated mantra "The Code is the Code ».

The early Net philosophers saw the Net as a supranational, universal creation subject exclusively to its own laws:

Whatever is technologically possible is the law.

This raises at least 3 questions: 1) is there such a thing as laws above the law? 2) is technology above the law? and 3) what is the impact of the theory on Justice?

1.

This first question already troubled the Greek philosophers and authors of the famous tragedies of antiquity.

In Sophocles' Antigone the dilemma between following the edicts of Creon on the one hand and those of the gods on the other was the centerpiece of the choice Antigone had to make when burying her brother (in violation of Creon's orders).

Most philosophers today seem to agree that there are certain principles above law (except for the positivistic school and those that view human rights as hitherto unwritten legal principles thus allowing "humankind" to hold for instance perpetrators and instigators of war crimes accountable even though they have violated no laws under the jurisdiction and at the time and even if they acted under order).

These notions are however of a completely different nature to those advocated by the disciples of the Code who seem to defend a principle according to which whatever technology may produce or create should not be restricted in any way. Technology is a gift to mankind and there is no such thing as good or bad technology. If technology allows us to do something, then it should be done.

2.

One has to question which version of history books these philosophers source their wisdom from. It ought to be a truism that history is packed with unfortunate discoveries and technology. Of course they argue that technology is not "unfortunate" in itself and that it is « only « their use which may be abusive.

If that is accepted by the proponents of the Code I frankly don't understand the theory's intellectual contribution. If the use of technology may be nefarious and if that is admitted by these theoreticians, then this will precisely result in the need to regulate and that in turn means that the « Code is not the Code ». What didn't I understand?

We have several examples of technology enabling us to « do things » which for various reasons (mainly ethical) we decide not to allow.

Lets' take human cloning as an example.

At least since Dolly we have been able to clone almost every living creature, but we have decided not to allow human cloning.

We will allow certain specific and controlled applications for instance stem cells, but not general cloning: A right to be or not to be cloned....

We have agreed to establish bio ethics boards and trust them to perform an oversight function regulating the indiscriminate use of technology on ethical grounds.

Subliminal advertising is illegal - precisely because it is possible. The Code cannot be the Code.

Do the contenders of this dogma wish to allow unrestricted use of bio technology including development of biological arms?

Does this theory actually have substance?

3.
The theory is extremely dangerous in that it dehumanizes Justice.

It amounts to social Darwinism: "Might is Right".

I am sure that had these early Net philosophers realized this consequence they would have been less enthusiastic in embracing this « New » World Order. They would have recognized that the "new" order is the oldest in history.

It took centuries for Justice not to reflect the ethics of those in power and unfortunately this struggle continues till this day. It will most probably never end. Growing inequality gives rise to discrimination not just in terms of social justice, but also in terms of just Justice.

Reverting to a regime where the code is law amounts to corporate dictatorship at all levels. Might will return to right.

These dynamics (Free Speech absolutism based on a misconception of the social function of speech and unrestrained celebration of technology) have allowed the Titans to control the world and we have not only allowed it, but almost fanatically helped them.

The Modern-Day Proletariat

Today the world resembles the social structure of the mid-19th century.

This was the time when Marx developed his theories about the proletariat, class struggle, historicism, phenomenology, the superstructure, ownership and the revolution.

I cannot help but draw parallels from this Marxist analysis to our time.

Our modern-day proletariat is comprised of those of us who are not data masters. This means almost all of us. We are the new proletariat. We are data serfs. We have turned into objects, not even "data subjects » (in the misleading terminology of the GDPR).

The superstructure is the mythology superimposed upon us all which we blindly fight for without understanding that is not ours, but that of our masters'.

In John Dewey's famous words we find a poignant reminder of this social dichotomy: *"As long as politics is the shadow cast on society by big business, the attenuation of the shadow will not change the substance"*.

The legacy of these philosophers seems to find support in modern day thinkers like Joseph Stiglitz.

Among the ingredients of the superstructure we find the Free Speech Dogma which we all subscribe to almost hysterically without realizing that every time we do so we surrender yet another piece of our freedom to the Titans.

The New Masters

We may ask how we allowed them to become so dominant. Didn't we have regulations in place to protect us against this exploitation of our weaknesses? How did we let ourselves fall prey to these new masters and why did they receive such overwhelming popular support from us all? Are we just like the lemmings?

I shall only deal with one aspect of these questions here and that is anti-trust.

As we know in the 1890's anti-trust regulation entered the stage in the US with The Sherman Act.

This act criminalizes monopolization as well as abuse, but it has been applied to media in peculiar ways (based on a classic/conservative consumer protection ideology which continues to inspire advocates of Titan rule: The service is free and therefore cannot harm consumers – full stop).

Let us remind ourselves of the Sherman Act:

Section 2:

*"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"*¹

In the words of Senator John Sherman at the time the question we are addressing seems even more pertinent: *"If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. »*.

Isn't that exactly what has happened to today's power base?

With new controls on freedom of enterprise consumer choice and pricing the concept of the « natural or enlightened monopoly » was developed.

As we know from Tim Wu's research this was the tactic of AT&T (*"One policy, One system, Universal Service."*).

The government bought it and protected the company against competition for 70 years (from the Kingsbury Commitment in 1912).

How does Freedom of Speech and Information fit into this regulation of dominance?

Here the early decision (1945) *Associated Press v. U.S.* is worthwhile rereading since in the words of the Supreme Court the business of news (and not products) *"does not afford the publisher a peculiar Constitutional sanctuary... Freedom to publish means freedom for all and not for some ... Freedom of the press from government interference doesn't sanction repression of freedom by private interests."*

These words of wisdom could not have been more accurate.

They were consistent with the decision of the Supreme Court in 1943 (*NBC v. US*) that the First Amendment does not protect against FCC oversight (some degree of regulation was permitted).

Unfortunately, they were quickly forgotten and with the Newspaper Preservation Act of 1970 media consolidation took off and the wisdom of the *Associated Press* judgment was abandoned.

Then of course came the Telecommunications Act of 1996 and the remaining restrictions on consolidation were all but repealed.

It is interesting that section 230 C should be introduced at the same time.

True the FCC tried to reinstate a certain portion of merger control in 2003, but it was short lived and actually increased network reach.

A recent legislative initiative proposed a « New Deal » with some measure of regulation, but what is needed is not a Rooseveltian New Deal, but a Better Deal.

The problem is that anti-trust enforcement and regulation are based on perceived harm to consumers, but the risk inherent in media consolidation is not consumer harm: It is the harm it inflicts on democracy, free speech and the right to information.

Merit-based monopoly may be a valid defense with regard to commodities, but not when it comes to information.

Information access and diffusion are not a question of consumer welfare and prices.

The discussion should not be on content throttling or pricing (of relevance to the Net Neutrality debate), but on concentration and ownership.

It will be interesting to follow the DOJ case against the AT&T merger with Time Warner. Will the trend change and how might that affect the Net?

It is also compelling that the Titans should have succeeded for so long in obtaining both immunity under art 230 by not being media and at the same time successfully argue that as far as anti-trust goes they should be treated like media - yet another tribute to their intelligence.

If the above Supreme Court decision from 1945 and the words of Senator Sherman had continued to guide the application of anti-trust, we might have seen a breakup of the present information domination a long time ago.

As it stands now we have to turn to the European Commission for help and the research conducted by Jean Tirole.

This Nobel Prize laureate has contributed significantly to our understanding of the “bifurcate business model” (two-sided or multi-sided markets) as well as the dynamics of the “gentil monopole” (as they say in French).

We now understand how the business model of the Titans allows them to dominate several markets at the same time and make money on basically everything.

We also understand how their oligopolistic status degenerates into monopolistic control of these different “desiderata” simultaneously and how the pricing equilibrium functions in spite of apparently contradictory externalities.

The consequence is not only complete control over both horizontal and vertical markets, but also the creation of multifaceted barriers to entry.

Total information control is here to stay unless we regulate ourselves out of it. The mechanism of disruption has been disrupted.

One frightening concrete example of the abuse that information control leads to is the impact of selective news not only on democracy, but on us all as individuals.

In the words of Kierkegaard again:

“Once you label me you negate me ». Imagine if Kierkegaard had known about echo-chambers.

The Right to Dignity

Let's now turn to the final question: How do we deal with the Net's harm to the dignity and integrity of countless victims of defamation, cyber bullying, harassment and trolling? This should really be the Leitmotif governing our attitude toward tech regulation and on this particular point anti-trust won't help.

The Tech Titans have - again - been very clever in maintaining that protection of victims is not their problem or responsibility. They are not accountable.

What they fear most is passion. What they lack most is compassion.

If your life is ruined because of harmful content freely traveling through their infrastructure that's just too bad. You deal with it. It's your problem. It's part of the game.

Apart from the sheer arrogance of such a position and the heartlessness it demonstrates the argument is fallacious:

First of all the victim didn't choose to be part of the game and didn't participate in drafting the rules. He didn't acquiesce. Nobody asked his opinion and in addition, the victim reaps no financial benefit from the game.

It is the Tech Titan, not the victim, who wrote and imposed the terms without consulting anyone and it is the Tech Titan that rules the world and reaps the benefits of the game.

A zero sum to the other players and a guaranteed profit to the bank. Would that pass in any other industry?

It is they - not the victim - that allow lives to be destroyed and it is they who incant the mass of Free Speech as the justification of their money and power wielding steamroller knowing very well that they have touched a nerve of religious sanctity and that anyone who might dare challenge them will be burned in inferno or at the stake as a heretic.

Clearly this reasoning rests on a combination of abuse of power and of the true value of Free Speech which was never intended to allow the destruction of the lives of innocent people.

It rests on a deliberate confusion between not only the right to Free Speech and the Right to Information, but also on the failure to distinguish between vertical and horizontal speech protection.

Vertical speech protection has almost no limit.

This is speech directed against government and authority. This is the core of Free Speech. This is speech that liberates us and preserves our freedom.

Horizontal free speech is the right to hurt our fellow man (« The Other »). This is the speech that deprives us of our freedom.

It is a category mistake - as Kant would have said - to confuse the 2.

In practical terms this means that the highly publicized difficulties of the « judgment call » in for instance The Right to Be Forgotten and its alleged incompatibility with Free Speech are groundless: If the victim of horizontal speech makes a prima facie case that the content in question is of such a general nature (words and context taken together) that it is hurtful to him it should be taken down.

Why is that so hard to understand and accept?

Why should the author deserve better protection than the victim?

This is different from all other transgressions. If harm is ascertained an end must be put to it and this can easily be done without judging the author as an offender or criminal.

This latter qualification must conform with due process, but an end must be put to harm immediately and it is not up to the Titans to decide whether harm is inflicted or not.

Who is better equipped to know and feel whether a statement causes harm than the victim?

No one can feel another person's pain and no-one should judge whether it is real or not.

Defending the author's right to hurt the victim by reference to the importance of vertical free speech is a logical fallacy, an abuse of a dominant position and of Free Speech protection.

Let our favorite philosopher make the closing statement:

*“Where am I? Who am I?
How did I come to be here?
What is this thing called the world?
How did I come into the world?
Why was I not consulted?
And If I am compelled to take part in it, where is the manager?
I want to see him.”*

Kierkegaard